Filed 3/8/11 Simone v. City and County of San Francisco CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FRANCESCA SIMONE, Plaintiff and Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent.	A126531 (San Francisco County Super. Ct. No. 454572)

Plaintiff Francesca Simone sued defendant City and County of San Francisco (the city) after she was struck by a car in an intersection on a city street. The city successfully moved for summary judgment on the ground, among others, that the intersection was not a dangerous condition as a matter of law. Simone appeals from the summary judgment entered in favor of the city.[1] Because we conclude there is no triable issue of material fact regarding the existence of a dangerous condition, we affirm.

[1] In the absence of prejudice, we deem Simone's timely September 29, 2009, notice of appeal to encompass both the August 21, 2009, judgment in favor of the city dismissing the action, and the September 29, 2009, amended judgment in favor of the city, awarding the city costs in the sum of $25,483.39. (See *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998; cf. *Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 691-694 [notice of appeal of final judgment did not encompass postjudgment order granting attorney fees and costs that was adjudicated *after* filing of notice of appeal].) Additionally, although the judgments do not resolve Simone's claims against all named defendants, she may properly appeal from the judgments, which are final as to her claims against the city. (See *Desaigoudar v. Meyercord* (2003) 108

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit arose from an accident that occurred on October 3, 2005, at about 6 p.m., on Taraval Street at its intersection with 33rd Avenue, in the City and County of San Francisco. Taraval Street is a four-lane road with two lanes going east and two lanes going west. There are no traffic control devices controlling the east-west traffic on Taraval Street, which has a posted speed limit of 25 miles per hour. MUNI light rail tracks run down the center of the street. The four-way intersection is a traditional rectangular shape, with painted crosswalks at the street corners.

At the time of the accident, the western crosswalk marking was slightly over a crest on Taraval Street, and not visible to westbound drivers as they approached the intersection traveling west (towards the ocean). However, there were no sight restrictions due to the physical configuration of the intersection. As explained by the city's expert traffic engineer Edward J. Ruzak, once a pedestrian stepped off the curb and passed any parked cars, there was "unlimited sight of motor vehicles and light rail traffic. . . . Likewise, the motor vehicle and light rail operators can see pedestrians when they le[ft] the curb or as they step pass[ed] a parked car."

The accident occurred as follows: Simone was walking in the western crosswalk across Taraval Street. She had already crossed more than half of Taraval Street when she was struck by a car owned by defendant Anatoliy Emmanuilov and allegedly being driven by defendant Artur Emmanuilov. The Emmanuilov car was traveling west on Taraval Street. The driver of the Emmanuilov car did not stop, and the car was later found abandoned in the city. The police officer who investigated the accident reported that the primary cause of the accident was the offending driver's failure to yield the right-of-way to a pedestrian in a crosswalk at an intersection in violation of Vehicle Code section 21950. The investigating police officer did not find evidence that suggested the offending driver had intentionally struck Simone or that the car's speed was an associated

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Cal.App.4th 173, 182, fn. 2; *Wells Fargo Bank v. California Ins. Guarantee Assn*. (1995) 38 Cal.App.4th 936, 941-942, fn. 5.)

causative factor, but the setting sun "potentially could have been in the driver's eyes, causing vision obscurement."

Simone sued the city based on the theory that the intersection was a dangerous condition of public property.[2] The city moved for summary judgment, which was opposed by Simone. The trial court granted the city's motion, finding, in pertinent part, that Simone had failed to raise a triable issue of material fact as to whether the intersection was a dangerous condition. Simone now appeals.

DISCUSSION

I. Standard of Review

"The rules of review [of summary judgment rulings] are well established. If no triable issue as to any material fact exists, the defendant is entitled to a judgment as a matter of law. [Citations.] In ruling on the motion, the court must view the evidence in the light most favorable to the opposing party. [Citation.] We review the record and the determination of the trial court de novo. [Citations.]" (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499.) Thus, regardless of the trial court's stated reasons, we will affirm a summary judgment if it is correct on any ground that the parties had an adequate opportunity to address in the trial court. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22; see Code Civ. Proc., §437c, subd. (m)(2).) [3]

II. City's Liability for Dangerous Condition of Public Property

Government Code section 835[4] establishes a public entity's liability for an injury caused by a dangerous condition of public property: "[A] public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a

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[2] After entry of the judgments under review, Simone dismissed her lawsuit against Anatoliy and Artur Emmanuilov with prejudice.

[3] Consequently, we do not separately address Simone's challenges to the trial court's reasons for granting summary judgment.

[4] All further unspecified statutory references are to the Government Code.

reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

The Government Code specifically defines a "dangerous condition" as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (§ 830, subd. (a).) But, "[a] condition is not a dangerous condition . . . if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (§ 830.2.) Thus, before we may submit the issue of the existence of a dangerous condition to a trier of fact, our independent review requires us "to determin[e] that there is evidence from which a reasonable person could conclude that a substantial, as opposed to a possible, risk" of harm "is involved." (Cal. Law Revision Com. com., 32 West's Ann. Gov. Code (1995 ed.) foll. § 830.2, p. 309.) "If . . . it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a). [Citation.]" (*Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 799, fn. omitted; see *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1133; accord, *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148.)[5]

[5] In light of our statutory authority to independently evaluate whether a dangerous condition is present pursuant to section 830.2, we reject Simone's contentions that the

In seeking reversal, Simone argues the conflicting declarations of her expert Harry J. Krueper, Jr., a well-known registered civil and traffic engineer,[6] and the city's expert traffic engineer Edward J. Ruzak, demonstrate that a triable issue of material fact exists as to whether the intersection was dangerous because "the elevation differential between dips and crests in the roadway surface approaching the subject intersection both reduce[d] drivers' and pedestrians' visibility of traffic in and around the intersection, creating situations where exposure without due warning and notice would constitute a trap condition." We disagree.

The declarations of the city's expert traffic engineer, and the photographs of the intersection, indisputably demonstrate that the intersection is not a dangerous condition. As explained by Ruzak (and not disputed by Krueper), the recognized stopping sight distance on a road with a speed limit of 25 miles per hour is 155 feet (or 250 feet for a car traveling at 35 miles per hour), and those stopping sight distances are exceeded on the Taraval Street approach to the intersection in that a westbound driver would have ample time to stop his car to avoid striking a pedestrian in the western crosswalk. And, the photographs of the intersection submitted by both parties establish that the physical configuration of the intersection does not prevent westbound drivers and pedestrians from anticipating and observing each other's presence in the intersection in sufficient time to avoid a collision.[7]

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proper application of summary judgment standards precludes a finding that there was no dangerous condition at the intersection.

[6] In her opening brief, Simone argues the trial court erred by striking Krueper's supplemental declaration, and she asks that we consider the document on appeal. The record, however, does not indicate the trial court struck Krueper's supplemental declaration. The city correctly concedes Krueper's supplemental declaration is properly before us, and we have considered it in resolving this appeal.

[7] Nor is the intersection rendered dangerous by the additional circumstances of "obscured sight lines caused by parked vehicles" along portions of Taraval Street and the daily phenomenon of the setting sun facing westbound drivers, which are "unavoidable risk[s] with which drivers [and pedestrians] must generally be expected to cope." (*Lawson v. Safeway Inc*. (2010) 191 Cal.App.4th 400, 410 petns. for review pending, petns. filed Feb. 8, 2011, request for depub. pending, request filed Mar. 3, 2011; § 831 [a

Simone's argument fails to recognize it is not the visibility or lack of visibility of the marked crosswalk, but the existence of the intersection itself that alerts both westbound drivers and pedestrians as to their duties when using Taraval Street at the intersection. (*City of South Lake Tahoe v. Superior Court* (1998) 62 Cal.App.4th 971, 978 (*City of South Lake Tahoe*).) A driver approaching an intersection (whether marked or unmarked) is duty bound to anticipate and observe whether pedestrians are attempting to cross at the street corners and to yield right-of-way to such pedestrians. (*Hatzakorzian v. Rucker-Fuller Desk Co.* (1925) 197 Cal. 82, 100; *Fischer v. Keen* (1941) 43 Cal.App.2d 244, 246, 248-249 (*Fischer*); see Veh. Code, §§ 21950, subd. (a) [driver of vehicle shall yield right-of-way to a pedestrian crossing the road within any unmarked crosswalk at an intersection]; 21950, subd. (c) [as a driver approaches a pedestrian within an unmarked crosswalk he "shall exercise all due care and shall reduce the speed of the vehicle or take any other action relating to the operation of the vehicle as necessary to safeguard the safety of the pedestrian"].) Conversely, a pedestrian crossing a street of heavy traffic in a marked crosswalk having the right-of-way, "cannot proceed blindly and in reckless disregard of obvious danger, but must exercise ordinary care to avoid a collision if the same could be avoided by the exercise of such care" (*Fischer, supra,* 43 Cal.App.2d at p. 252), and "such duty continues throughout his passage" (*O'Brien v. Schellberg* (1943) 59 Cal.App.2d 764, 768). (See Veh. Code, § 21950, subd. (b) ["[n]o pedestrian may suddenly leave the curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard," or "unnecessarily stop or delay traffic while in a marked or unmarked crosswalk"].) Thus, we reject Simone's contention that a reasonable trier of fact could find the lack of visibility of the

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public entity is not "liable for an injury caused by the effect on the use of streets and highways of weather conditions as such [unless]. . . it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care"]; cf. *Erfurt v. State of California* (1983) 141 Cal.App.3d 837, 841, 845 [dangerous condition described as the sudden appearance of blinding sunlight as a driver reached the crest of a hill combined with the lack of devices to properly guide and warn the driver around an object in the middle of the road].)

marked crosswalk affected a westbound driver's ability to anticipate the presence of a pedestrian or the time needed to react when a pedestrian appeared in the western crosswalk.

We are also not persuaded by Simone's argument that the declarations of local users of the intersection raise a triable issue of material fact regarding the dangerous condition of the intersection. The local users of the intersection confirmed that before crossing at the intersection they made sure there was no vehicular traffic in either direction. As explained by one local user, she tended "to cross in the western crosswalk in order to see and be seen by traffic in both directions." The local users of the intersection also averred, in relevant part, that drivers often did not slow down and yield to pedestrians attempting to cross Taraval Street. However, while it may be true the street's decreasing elevations for westbound drivers "encourage drivers . . . to exceed the speed limit, this does not establish a dangerous physical condition for purposes of section 835." (*City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21, 31.) "[E]ven though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons." (Cal. Law Revision Com. com., 32 West's Ann. Gov. Code (1995 ed.) foll. § 830, p. 299.) "The [c]ity cannot be charged with foreseeing that a motorist will recklessly disobey traffic laws and speed through an intersection without heed" to pedestrians, "particularly when the need to take precautions is self-evident and the law is clear on how motorists must behave under the circumstances." (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1195-1196, fn. omitted.)

Relying on the city's revised draft guidelines for the installation of marked crosswalks at uncontrolled locations, Simone contends the intersection is a dangerous condition because it creates a trap (§ 830.8) by inviting pedestrians to cross at a location where a marked crosswalk should not exist unless there are additional signs warning about the potential presence of pedestrians, and at the same time, oncoming drivers cannot see the painted crosswalk and believe it is safe to travel through the intersection

not knowing that pedestrians believe they can safely cross there. We conclude Simone's argument is unavailing.

Section 830.8 imposes liability on a public entity for accidents proximately caused by its failure to provide a signal, sign, marking, or device to warn of a dangerous condition which endangers the safe movement of traffic *only if that condition "would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."* (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1193 (*Sun*); italics added.) "Cases holding public entities liable for failure to warn of dangerous conditions are based on the presence of an actual dangerous physical defect or an otherwise dangerous condition which was not apparent to persons using the property with due care. [Citations.] In all such cases, the *inability* of any user to see or appreciate the danger remained a constant feature of the property whether used by careless or careful persons." (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131-132; italics added.)

Here, Simone has not presented any evidence from which a reasonable trier of fact could find the lack of a visibly marked crosswalk created or increased the risk of harm faced by pedestrians at the intersection, thereby creating a trap requiring warning signs. Her reliance on her expert's declarations is misplaced. An "expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.) Krueper's opinions are based on the concept that the marked crosswalk could be seen by pedestrians but not westbound drivers. However, as we have noted it is not the marked crosswalk but the very existence of the intersection that alerts both westbound drivers and pedestrians as to their duties when using Taraval Street at the intersection. (*City of South Lake Tahoe, supra*, 62 Cal.App.4th at pp. 978-979.) Krueper also opined the city failed to follow its revised draft guidelines concerning the installation of marked crosswalks at uncontrolled locations, including the installation of " 'STOP' signs" to provide sufficient safety to the public. However, sections 830.4 and 830.8 bar liability for the city's purported failure to install STOP signs to control the east-west traffic on

Taraval Street. (*Sun, supra,* 166 Cal.App.4th at pp. 1182, 1184, 1193.) Without a foundational showing that the intersection was a dangerous condition, evidence that additional crosswalk markings or signs would have prevented the accident is not relevant. (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 442-443; see *Dole Citrus v. State of California* (1997) 60 Cal.App.4th 486, 494 [evidence that property could be made safer by some other means is not relevant to determining the existence of a dangerous condition].) In all events, the placement of STOP signs would not prevent westbound drivers from striking pedestrians. The only way to prevent the risk of harm to pedestrians at the intersection would be to put up physical barriers, which if effective, would have the effect of closing Taraval Street to pedestrian travel at 33rd Avenue. "But determining and regulating the use of public property are better left to legislative and administrative bodies, rather than to the judiciary." (*Hayes v. State of California* (1974) 11 Cal.3d 469, 473, fn. omitted.)

In sum, we conclude the trial court correctly granted summary judgment in favor of the city. "Having viewed the photographs of the intersection we have no hesitancy in concluding as a matter of law" that there is nothing which would prevent an observant westbound driver from becoming aware of pedestrians at a safe distance before entering the intersection and "that no reasonable [trier of fact] could find that [the intersection] constituted a dangerous condition." (*City of South Lake Tahoe, supra*, 62 Cal.App.4th at p. 979.) [8]

[8] In light of our determination, we do not address Simone's alternative arguments for reversal that the evidence raised a triable issue of fact regarding the city's notice of the alleged dangerous condition and the city failed to establish its affirmative defense of design immunity pursuant to section 830.6.

DISPOSITION

The judgment and amended judgment are affirmed. Defendant City and County of San Francisco is awarded costs on appeal.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.